BABYLON IN JEWISH LAW.

For the March number, 1901, of the *Hebrew Union College Journal*, at Cincinnati, I wrote long before M. de Morgan had discovered, long before Professor Scheil had deciphered, the Code of Hammurabi in an article on the supposed relation of Talmudic jurisprudence to Roman law, as follows:—

> But in some branches of the law we find strong proofs of a foreign origin in the use of foreign words. The sealed instrument of the Mishnah, the *Shetar*, literally a writing, tells its own story by its name, which is clearly Babylonian, and we find that the leading incident of its form, the signature by two witnesses, is also Babylonian, as appears clearly from the many thousands of contract tablets which have been found in the ruins of Babylon. The signatures of these witnesses are spoken of as "sealing," and take the place of the actual sealing by impression on wax, or like substance, which we so often meet in Scripture. Again, the word for dowry, Nedan or Nedunya, and the laws of the Mishnah which relate to the dowry, such as the distinction between liquid property and the "iron flock" are most probably Babylonian.

Since I wrote the above, the great Code of the Babylonians has been brought to light and deciphered, and it has gathered around itself quite a literature of transliterations, of translations, and of commentaries in German, French, English, and Italian. I need but mention C. H. W. Johns in England (two editions), Prof. E. R. Harper in the United States, Hugo Winckler in Germany, Dr. David H. Müller in Austria, R. Dareste in France, as translators; and among commentators, Stanley A. Cook, who has done me the honour of quoting some of my articles on Talmudic jurisprudence in the *Jewish Encyclopaedia*. The scholars who have taken this subject in hand are so nearly in agreement, they differ so seldom about the sound or meaning of the chiselled characters,

that the substantial correctness of both decipherment and translation cannot be doubted. Some decipherment was needed, for the characters differ broadly from those of other Assyrian, and even of other Old-Babylonian texts.

This great find has heightened the interest which had been felt for ten years or more in the jurisprudence of Assyria and Babylon, as drawn from contract tablets, from tablets containing judicial documents, surveys of land, and from official and private letters.

In the following pages the word "law" is used in its popular meaning as the body of those rules which the state enforces between man and his neighbour (or between man and wife), including the redress of wrongs and the punishment of forbidden acts, in one word, in the sense of jurisprudence. Ritual precepts are not considered, and moral precepts which are addressed to man's conscience and sanctioned only by the fear of God, only in so far as they throw light upon legal relations which the arm of the state does enforce. A kindly system of morality goes hand in hand with a mild civil and criminal code.

By Jewish law I mean not only that which is laid down in the Pentateuch; in fact, so much has already been written by scholars of the highest rank upon the co-incidences and discrepancies between the Code promulgated by King Hammurabi and the Torah that any contribution from my pen would be superfluous. I shall only outline my somewhat original theory as to the relation in which the latter stands to the former where the Torah agrees with the Code, where it modifies the Code, or where it wholly contradicts it.

The columns of writing on the stele bearing Hammurabi's Code are very narrow, with only three, four, or five characters in a line. Hence there is no room for marking paragraphs by shortened lines, as in the scrolls of the Pentateuch; nor are the sections otherwise divided. On the tablets containing copies of a few sections, however, these are separated by horizontal lines or cuts. Taking

a hint from these, Father Scheil undertook a division of the whole code into sections, following mainly the arrangement of hypothetical case and applicable rule, i. e. "When a man, &c., then shall, &c.," pretty much like the "judgment" in Exod. xxi. 2: "When thou buyest a Hebrew servant, six years shall he serve." Father Scheil thus numbered 65 sections before he came to the gap of five columns that had been chiselled out. Then beginning in the middle of a section, he called it 100, thus allowing 34 sections for a gap. He then runs on from 100 to 284, but by mistake gives the number 176 to two successive sections. All the later editors have followed his numbering. On the tablets bearing copies some contain in a rather mutilated shape three of the missing sections, while the contents of 98 and 99 can be guessed from the contents of those that follow.

The king's proclamation, full of bombastic self-praise introduces his laws: they are followed by an epilogue in the same style. He does not claim that any of the gods or goddesses whom he worships, and by whom he is favoured, have revealed or inspired these laws. But he takes great credit to himself as being the defender of the weak against the strong, the friend and helper of the widow and the fatherless; and for this, that he makes the laws of his kingdom known, so that each man may know his rights and his duties. This indicates that in substance the laws were not new; probably they were already known to the judges as a rule for their decisions, and were handed down in the ruling class, and that they were now gathered and published as a concession to the people, just as sixteen hundred years later the twelve tables at Rome were drawn up and publicly exhibited to satisfy the clamours of the plebs.

In the comparison between the law of the Babylonian Code and the law of the Mishnah, which follows below, I have not copied out the former at large, as those of my readers who take an interest in the subject can easily find

them in English, French, or German, some of the editions (especially the second rendition by Johns) being readily accessible. Where the translators differ as to the meaning of an important word, I state which of the conflicting views I follow. I only refer to those sections which have a counterpart in Jewish law, and mark them by the numbers given to them by Father Scheil.

1–3 deal with the punishment of false accusers. These are punished only when there is a failure to convict. The Sadducees, following what they took to be the literal meaning of Deut. xix. 17–20, held they should be punished when the accused has been convicted and put to death or otherwise made to suffer on their testimony. But the Sages, following a tradition akin to the Babylonian law, held that the "plotting witnesses" are judged when the trial is at an end if an *alibi* is established, and are then punished (*Makkot*, I, 6), but not when their victim has already suffered.

4. Retaliation is here denounced against witnesses in "causes of silver or of corn," i. e. in ordinary civil suits. The text in Deuteronomy seems to exclude such cases from the rule; the Mishnah (ibid., I, 2) provides for them, going so far as to prescribe how witnesses are to be dealt with who falsely testify that a debt is due in thirty days when it really has a year to run.

6. He who steals from a god or from the king, or who receives a thing thus stolen, is put to death; nothing is said in this section about conviction, nor of an alternative manifold restitution. Probably those guarding the temple or palace were instructed to kill the thief on sight. The Mishnah (*Sanh.*, IX, 6) says: "The zealots fall upon (i. e. the first comer kills) him who steals the Qasvah": one of the golden tubes on the table of shewbread, a vessel of great value, but easily removed, which is named as a representative of other articles liable to theft.

7. He who buys, or takes on deposit, things of value from the owner's child or slave is deserving of death.

The Torah is silent about receivers of stolen goods, but the Mishnah (*B. Q.*, X, 9) forbids as dishonest the buying of wool or milk or kids from the shepherds, or the buying of anything about which the seller says "Hide it," and the Baraitha (*B. Q.*, 118, 119) forbids the buying of certain other things from the owner's wife or children.

9, 10, 11. The owner of missing goods finds them in the hands of another, and traces them or tries to trace them back to the thief. As usual the party in the wrong is threatened with death. The Torah says nothing on this subject; the Mishnah (*B. Q.*, X, 3) says: "Where one recognizes his implements or books in the hands of another, and there is a rumour in the town that they are stolen, the buyer shall swear to him how much he gave, and he may take them at that price." Not very severe, even generous to the buyer; but to some extent it covers the ground.

12. Here the estate of a dead man is mulcted: this the Mishnah cannot well do, as it hardly ever undertakes to impose mulcts and penalties unknown to the Mosaic law; it orders at most a simple restitution by the heirs.

13. For absence of witnesses a trial is postponed for six months. The Talmudic law (*B. Q.*, 112 b) allows for like reason a postponement for thirty days in suits for debts, sometimes for ninety days, or even for twelve months. The Torah is wholly silent about the postponement of trials.

14. Kidnapping the "infant son of a man," that is, a child of the upper class, is punished with death. The Mishnah (*Sanh.*, XI, 1) says: "He who steals a soul in Israel." *Quaere*: Is the intention here to withdraw the kidnapper of a convert from the death penalty?

15–20. Here the slaveholder is secured against the escape of his slaves. The Jewish tradition had in this matter to cut loose from Babylonian harshness: yet it showed a strong belief in the sacredness of the property in man: for the words in Deuteronomy (xxiii. 16, 17): "Thou shalt not deliver up the bondman to his master, &c.," were

confined by the Sages (Onkelos, ad loc., *Gittin*, 45 a) to the narrow and rare case when a slave flees from a place outside of the Holy Land to a place within its borders.

21. This section confers on the inmate of the house the right to kill the burglar *in flagranti*; but no distinction is made here between day and night. The words of scripture, "if the sun shineth upon him," are frittered away by the Sages (Onkelos and Mekilla, ad loc., *Sanh.*, 72 a, b) into the meaning, "if the housebreaker's intent not to hurt the owner was as clear as the sun." In short, the Sages follow Hammurabi rather than Moses.

30. The king's vassal loses his right in his "field, orchard, or house" by adverse occupation for three years. In the Mishnah (*Baba Bathra*, III, 1) a possession of houses or lands for three years raises a presumption of grant which can, however, be rebutted. It may here be remarked that "field, orchard, and house" throughout the Code means any improved real estate, perhaps any land in private ownership, and corresponds to the קרקע of the Mishnah. In the Torah, excepting the attempt to make lands in Palestine inalienable by the law of Jubilee, the distinction between landed property and personalty is never pressed forward. The Mishnah prescribes different modes of alienation for lands and for goods.

40. Any one, man or woman, other than the king's vassal, can sell or give away his land at will. Under the law of Jubilee (Lev. xxv) land could not be sold permanently. The Mishnah, speaking clearly of land in Palestine, as well as of land elsewhere, allows it to be acquired freely by deed, by money payment or by occupation (*Kiddushin*, I, 4), even while the temple stood. Here Hammurabi again is followed rather than Moses.

41, 42, 43, 46, 55. These sections deal with the rights and duties of landlord and tenant in husbandry; on this subject the Torah is altogether silent, as it presumes every Israelite to till his own fields; the Mishnah is pretty full (*Baba Metzi'a*, IX, 3, 4, 5): "If one rents a field from

another and allows it to lie fallow they assess how much the field ought to produce, and he must pay so much; for thus is the written form: if I leave fallow and do not cultivate I shall pay according to the best results." Assessing in this way the field's capacity leads to the same result as the Babylonian requirement, that the remiss tenant must furnish as much produce per acre as his neighbour. Again: "He who rents a field from another, and refuses to weed it, is not allowed to say: What difference is it to thee, as long as I pay my fixed rent; for the landlord might answer: to-morrow thou goest away having raised for me a crop of weeds." On the other hand, if the tenant agrees to pay a heavy penalty for not fulfilling his undertaking as to the quantity of the crop, such covenant is invalid (*Baba Metzi'a*, 104 b). (The Code elsewhere disallows the enforcement of penalties.) Further: "One who rents a field from another on shares, and it has not done well: as long as there is produce enough to cover the whole threshing floor it is the tenant's duty to toil for its completion."

57, 58, which impose manifold reparation upon the shepherd who grazes his flock on the field or meadow of another, and fix a round price for grass wantonly depastured, could not be followed by the Sages for lack of power.

59. The Mishnah (*B. Q.*, VIII, 6) says: "Though one is not (morally) permitted to cut down his own trees, he is not liable to any one for doing so; if others do it, they are liable." It thus appears that in the sight of the Mishnah this form of trespass was odious, just as in Babylonian law: trees, especially fruit trees, being thought to be highly important to the general welfare both east and west.

60, 61. The non-user of fruits in the first four years of the tree's life, which in the Torah is a ritual ordinance, is at Babylon part of the customary arrangement between owner and gardener. The Mishnah (*Ma'aser Sheni*, I, i, 2, 4) treats of the redemption of the fourth year's fruit. But at Babylon the equal division of the fifth year's fruit seems to extend to later years also, and is met by the Jewish

custom (*Baba Metzi'a*, 109 a) of allowing one-half to the gardener (שחל) who plants the trees, though a third party beside the owner and professional gardener, the tenant-on-shares, may be introduced.

62, 63, 64, 65. The gardener who undertakes to plant or to graft trees is made liable for bad work. So the Baraitha (*B. B.*, 95 a) says: "Where *A* receives a field from *B* to plant, the latter must allow ten barren trees in a hundred; if there be more than ten the gardener is liable for all."

One of the tablets found in Assurbanipal's library, which supplies a section between 65 and 100, which Hugo Winckler in his edition marks 2 d, repeats and states more fully the law against antichresis (setting off the crops against the interest on a loan of an orchard by the merchant mortgagee).

100–107 (which deal with the great merchant or Tamgaru, and his travelling factor or Shamallu). The Torah is silent as to the special partnership between merchant and factor; the Mishnah (*B. M.*, V, 4) refers to it, only safe-guarding it against the invasion of usury, thus: "They must not set down a storekeeper at half-profit, nor give money to buy produce at half-profit, unless (the capitalist) gives (to the factor) his wages as a labourer." But leading Tannaim admit that to give something quite nominal, e. g. one dried fig, takes the arrangement out of the usury laws. The Mishnah (ibid. 5) shows that these special partnerships were most frequently formed for raising cattle, asses, or fowl. A Tosefta and the Palestinian Talmud add some further rules: "When *A* gives money to *B* to buy produce on half profit, and *B* does not buy, then *A* has only a moral complaint (תרעומת); but if it be shown that *B* has bought and sold *A* can recover half of the profit from him." Other rules are added as to deviation from the capitalists' instruction. Such partnerships (עסקא) have been frequent among Jews even in modern times. The form of the contract is given in the form-book *Naḥalat Shib'ah*, published at Amsterdam in 1666.

108, 109, 110, 111. Here the tavern is met; an institution

unknown to the Bible, and known to the Mishnah only by the name of Pondak, derived from the Greek *πάνδοχον*. The tavern-keeper is by the Sages, as in Hammurabi's Code, supposed to be a woman of low standing; see *Yebamoth*, XVI, 7, and the rendition of זונה (Joshua ii. 1 and Ezek. xxiii. 44) as פנדוקית in the Targum, a tavern-keeper, as well as in the Septuagint.

112 is severe on unfaithful "common carriers." Among the uncommercial Jews these were almost or quite unknown; hence one who undertakes to carry goods or valuables and convert them could not be treated more harshly than any other "hired keeper."

113, 114. These sections deal pretty sharply with a creditor who without judicial writ levies on the debtor's goods or slaves. The Baraitha treats him who does so as a robber (גזלן), not *lestes* or brigand; see *Baba Qamma*, IX and X, and *Shebu'oth*, VII. It speaks of collectors and tax-gatherers as presumptively robbers, but this is probably due to the domination of the Roman procurators. One found entering his neighbour's house uninvited is presumed to come in order to make an unlawful distraint. But the Sages do not assume the power to forfeit the creditor's demand when he has made an unlawful distraint, as the Code does, not feeling authorized to impose penalties unknown to the Torah.

115, 116. These sections remind one of the ergastulum of the Romans, in which the creditor imprisoned his debtor and put him to work. Though nothing is expressly said in the Code about the prisoner being compelled to work, it seems to be implied. It is needless to say that arrest or imprisonment for debt in any form is unknown to the Mishnah.

117. Babylon does not sell the debtor, but sells his wife and children into bondage. As to the latter, it is followed by the custom in Israel in the days of the kings, as shown in the well-known story of the woman with the cruse of oil. The Torah (Exod. xxi) speaks of the father's power

to sell his daughter, but the Mishnah greatly restricts this; for the daughter must be within the age of puberty when sold, and she goes free when she reaches it.

118. The Sages recognize the debtor's right to sell his non-Hebrew slave for his debt and to give a good title to the purchaser. Such slaves are classed with land as estate under "lasting liability" (אחריות); see *Kiddushin*, I, 5.

119. The privileged position of a bondwoman who has borne children to her master seems to be recognized by the book of Genesis, but under the policy for breeding a pure race set on foot by Ezra and Nehemiah the Sages (*Yebamoth*, II, 5) would not recognize a son by a Gentile or slave woman as his father's child for any legal purpose.

122, 123. A deposit is not to be made except before witnesses, or against a receipt in writing. Compare in Jewish custom the request made at the time of deposit: do not repay me, or do not return the deposit to me, except in presence of witnesses.

124. The depositary pays double for what he has denied; see *B. Q.*, 64 a, b on the meaning of the scriptural "he shall pay double to his neighbour."

127. "Putting forth the finger," which is here punished, reminds one of the like phrase in Isaiah lviii, where "putting forth the finger" is reproved as godless. The meaning, both in the Code and in the prophet's rebuke, is slander.

128. (No marriage without writing.) The Sages labour under much difficulty as to formless marriages. They know that in Bible times wives were often taken without formality, and the treatise on betrothals opens: "A woman is acquired by silver, by writing, or by cohabitation"; but they show a strong repugnance to a marriage entered into without ceremony. It is held (*Giṭṭin*, VIII, 9) that cohabitation with a divorced wife is a remarriage, as the man would intend his act rather as conjugal than as meretricious; yet elsewhere (ibid., 3 a) there is an attempt to declare a formless marriage void, or at least to force the husband

to the alternative of either divorcing his wife or remarrying her in form. The attempt to settle on the wife less than the lawful jointure (compare Code, 139, 140), according to a section of the Mishnah, lowers the espousal to a sort of prostitution (*Kethuboth*, V, 1). Hence we must either disbelieve the statement that a personage as late as Simeon ben Shetah instituted the written settlement known as Kethubah, or understand it in the sense only that he settled the form of the instrument such as in the times of the Talmud was, and in the main still is, in vogue. Beside the payment of jointure and return of dowry this form has the clause (not found on Babylonian tablets): "I shall serve and honour thee, feed thee, and provide for thee, like Jewish husbands who serve and honour, &c., their wives faithfully."

137, 138, must be considered together. In the latter *sheriqtu* is defined by the words "which she brought from her father's house"; in the former this is implied, for the husband is to "return" it to her, while he is to give her the *tirḫatu* or bridal price, the *mohar* of the Bible. Hammurabi's Code shows on its face this progress in marital relations, that while at first the *tirḫatu* was paid by the wooer to the maiden's father, and kept by him, and in sect. 160 the groom is said to bring valuables to the father-in-law, along with or before the payment of the *tirḫatu*. Yet at the date of the Code, it seems, all or most of this price was at the wedding entrusted to the husband, and he bound himself in writing to return and pay his wife on some future event both *sheriqtu* and *tirḫatu*. This is the *riksatu* or written contract of sect. 128. Now the *Kethubah* of the Mishnah, which is still in use among the great body of the Jews, is in the main a bond to pay to the wife upon the understood event of death or divorce 200 zuz or 50 shekel if a maiden, a mina or 25 shekel if a widow, and as much more as he chooses to add to such minimum, and to return to her her dowry. The return of the latter is implied; for it remains, with whatever the wife gains by

inheritance or gift during wedlock, her own property, either *nikse malog*, or liquid estate (*Yebamoth*, VII, 1), whereof the husband receives the income, or "estate of the iron flock," which the husband has bought at valuation, and which becomes an unchangeable debt from him to her.

From motives of delicacy the *Kethubah* does not name the contingency—death or divorce—upon which the jointure and dowry are to be paid. The Babylonian Code (137, 138) does not in terms refer to the contingency of death, but as both the objects of these sections are supposed to have come from the father-in-law's house they must also have been treated as her property, of which she has the free use whenever she becomes a single woman.

139, 140. When no bridal price is fixed, a full-blooded citizen (*mar awilim*) pays upon divorce (? or death) one mina, a plebeian one-third of a mina. Such a discrimination seems inadmissible in the Israelitish democracy, yet beside the difference of 200 zuz to the maiden and 100 zuz to the widow (*Kethuboth*, I, 2), which is quite natural, another distinction is reluctantly admitted (ibid.) between Cohanim and plain Israelites: "The court of priests would levy 400 zuz for a maiden, and the Sages did not hinder them." The Cohanim were a sort of nobility of birth, and at least in the male line always of pure Israelitish stock, their line never passing through converts: and here something like the Babylonian distinction in rank crops out.

In the absence of a written *Kethubah* the husband in the event of divorce, or his estate in case of his death, pays 50 shekel to the virgin wife, 25 shekel to the widow: the minimum of the written contract (*Ket.*, VI, 7).

154. He who cohabits with his own daughter, says the Babylonian lawgiver, is driven out of his city. Does not such expulsion bear some analogy to the threat so often met with in the Pentateuch: that soul shall be cut off from the midst of Israel? But curiously enough, though the Mosaic law against incest is so much broader than the Babylonian, cohabitation between a man and his daughter

is forbidden only by necessary implication, but not in direct words. Is this so because the Israelite, acquainted with the common law of Western Asia, was supposed to know the shamefulness of such a connexion? On the other hand, the Mishnah (*Yebamoth*, I, 1) sets the relation between father and daughter at the very head and beginning of forbidden degrees.

166. The provision here made to equalize the younger sons to the amount in which the elder sons have been advanced by the father in order to obtain wives for the latter is remarkably like the rule (*Ket.*, VI, 6) which gives from the deceased father's estate to the younger daughters dowries equal to those which the elder daughters have received in his lifetime.

167. The division among children by different wives of the settlements made on their mothers here mentioned, takes place according to the Mishnah (ibid., IV, 10) even if the clause *B'nin dikrin* has been omitted in the *Kethubah*, on the usual ground that this clause is one of the "judicial terms" (תנאי בית דין) which need not be written.

168, 169. These sections deal with the rebellious son much more mildly than Deuteronomy (xxi. 21), just as sect. 195, about the son who curses father or mother, is milder than Exod. xxi. 15, 17. Perhaps the old Babylonian tradition has something to do with the effort of the Sages (*Sanh.*, VIII, 1–5) to construe away the harsh provisions in Deuteronomy altogether by attaching to them impossible conditions.

172. In view of the agnatic principles of the Mosaic law of descent, and its aim to keep land in the *gens* (Num. xxxvi), the Sages could hardly give the wife a son's share in any event; but the Mishnah tries its best to help the widow at the expense of the "orphans" or heirs (*Ket.*, XI, 1): she is to be fed by them till her jointure is paid, and according to the custom of Jerusalem and of Galilee she need not accept payment of the jointure; and she may moreover live in the house left by the husband.

173. The division of the wife's dowry among her sons recalls the *B'nin dikrin* clause in the *Kethubah* (see above, 167).

178. Here, as in sect. 30, the difference between the law of land and the law of movables comes to the front.

180–182 give under certain circumstances to the daughter a heritable share in the father's estate, though not equal to that of the son. The Mishnah (*B. B.*, IX, 1) gives the daughters (within the age of ripeness) alimony out of the father's estate, and remarks that when the estate is small this alimony may absorb all of it: the daughters must be fed, though the sons go begging. In the Babylonian law the daughter's share is never given with an absolute right of disposal; in the Jewish law also it is a temporary provision.

184. See for this duty of the father to endow his daughter the Mishnah (*Ket.*, VI, 5), and for the rights of the younger daughters upon the estate, ibid. 6, *supra*, 166.

188, 189. These sections urge the importance of teaching a boy a handicraft. The foster father, who is to teach it, is called *ummanum*, the אומן of the Mishnah, where an אומנות is not every way of earning a living, such as husbandry or merchandise, but only a handicraft, this being the safest road to a steady living; see *Kidd.*, 30 b. Is not this notion rather Babylonian than Palestinian?

196, 197, 198, 200, 201. Eye for eye, bone for bone, tooth for tooth, literally where the injured party is a gentleman (*mar awilim*), money compensation, however, to a plebeian. This is a good starting-point for the traditional law (*B. Q.*, VIII, 1), which allows money compensation alone in all cases.

202, 203, 204, 205. The word *liëit* in these sections, following herein D. H. Müller, I connect with the Hebrew לחיה, and render it cheek or jaw. These sections show—first, that a stroke on the cheek, a slap, is a greater humiliation than any other stroke, and is visited with a heavy mulct aside from any injury or pain inflicted; second, that the punishment becomes greater with the higher

dignity of the party thus struck, and with the lower rank of the striker. The Mishnah (*B. Q.*, VIII, 6) says: "He who strikes his neighbour with the fist pays a shekel, R. Jehudah says a mina; if he *slaps* him, he pays 200 zuz; if he pulls his ear or tears his beard, &c., he gives him 400 zuz." On the other point it says, "this is the principle: it all goes according to the rank of the disgracer and the disgraced." Against this discrimination R. Aqiba protested, saying: "Even the poorest in Israel should be looked upon as if they were gentlemen reduced in circumstances; for they are the children of Abraham, of Isaac, and of Jacob." But all the Jewish Sages would have protested against such a distinction as was made by the Babylonian law: a money payment for a slap among equals, a cruel public whipping for the man who slaps his superior.

The element of damages for disgrace through the assault is derived (ibid., VIII, 1) from the provision (Deut. xxv. 10, 11) that a woman's hand shall be cut off pitilessly if while interfering in a fight she takes hold of a man's privates. But for an unbroken tradition in favour of paying for the disgrace (בושת), this passage could never have been extended so as to cover such wide ground.

206. "He shall answer the physician." Thus the tradition (*B. Q.*, 85 a) says that one guilty of an assault must pay a regular physician; he cannot put his victim off with an amateur, nor undertake the cure himself.

207, 208, 212. Following the Torah, and agreeing herein with the Roman law (*liber homo nullius est pretii*), the Mishnah never allows any compensation in money for the life of a freeman.

209, 211, 213. (Damages for causing a miscarriage.) The Torah (Exod. xxi. 13) sets no named mulct for causing a woman's miscarriage in an affray. The Sages (*B. Q.*, V, 4) are divided as to how the loss is to be assessed. According to R. Simeon ben Gamaliel, the value of the child of a free-woman if born alive is appraised and paid to the husband and father; in the case of a slave woman to her master.

210 is the *lex talionis* run mad: it orders the killing of a man's daughter because he caused the death of a free woman. The Torah so sternly forbids the punishment of children for the sin of their fathers that the old tradition had to give way to humanity and justice.

218, 219 (mutilation of the physician for killing or blinding his patient through an unskilful operation: restitution when the patient is a slave). Other sections (225, 229, 231, 232, 233, 235, 236, 237, 238) deal with veterinaries, shipwrights, builders, and skippers guilty of malpractice or negligence, and causing pecuniary loss. The Torah is silent about a mechanic's or other employee's negligence, and resulting loss to the employer, but under the Oral law a mechanic or any other person undertaking a job which requires a mechanic's skill, who through neglect or lack of skill (משיעות) performs his task ill, is liable to the owner for the ruined material (*Baba Qamma*, IX, 3, 4), there being no dispute except as to the true rule of assessing the compensation. The Talmud upon these sections of the Mishnah illustrates the rules from other crafts than those named in the Mishnah; but neither Mishnah nor Gemara mentions physicians, surgeons, or veterinaries.

244, 266. Here, as in the Mishnah (*B. M.*, VII, 9), the killing of a beast by a lion is always considered *vis maior* (אנס), and the loss falls on the owner, not on the shepherd. So with "a visitation by a god" of the Code, or "dying in her natural way" of the Mishnah (ibid., 10). But under both systems a very high degree of care is exacted from the shepherd, the latter requires such care as Jacob gave in his service to Laban, in accordance no doubt with Babylonian Law. A single wolf is not considered a good excuse for losing a sheep.

279. In the Mishnah, as here, the sale of a slave carries a warranty of title. Such a sale is likened to that of land (*Kidd.*, I, 5); and a sale of land implies a warranty, see *Gitṭ.*, V, 2; *B. M.*, 14 a.

280. A native slave brought home from a foreign country,

and recognized by his former owner, is to be set free; does not this recall the meaning given by tradition to the words in Deuteronomy about the bondman who fleeth "to thee" from his master, as applying only to the bondman who flees from abroad to the Holy Land?

A few examples from various branches of law may be given, where Babylonian principles, appearing at random in court decisions, in contracts, or in letters or other documents, coincide with very peculiar principles of the Mishnah.

(*a*) An old judicial tablet of Babylon, mentioned by Prof. Johns in *A. and B. Laws, Contracts*, p. 104, speaks of a suit being dismissed because the plaintiff sued before a Court of the City of Babylon, though he lived at Sippara. To modern lawyers this seems strange; because under all systems of European or American law the presence or the domicil of the defendant, not that of the plaintiff, gives jurisdiction to the Court. But the Rabbis also held, that the defendant must follow the creditor into the latter's forum; and they seek a Scriptural ground for this curious rule in the verse: "The borrower is a servant to the man that lendeth" (see *Sanh.*, 31 b).

(*b*) The calendar is closely allied to the civil law. Like the calendar of Israel that of Babylon was based on lunar months, that is, the period from one new moon to the next, and a solar year, having either twelve or thirteen months, each of the months having either twenty-nine or thirty days. The new moon was proclaimed upon actual inspection; the thirteenth month was inserted either after Adar, as among the Jews, or after Elul. The king, as the highest authority, proclaimed new moons and intercalary months; the patriarch did so in the Pharisaic ideal of government, representing the Sanhedrin, which in their view was the highest power in the State.

(*c*) Some of the Babylonian marriage contracts are concluded between the groom, other contracts between him and the bride's father. The ordinary Jewish *Kethubah* is

made between the groom and the bride: but when the father made use of his power of betrothing his daughter below the age of twelve years and six months (*Ket.*, IV, 4) without her consent, the *Kethubah* was written as a contract between the groom and the bride's father.

(*d*) Under the Babylonian law a girl once married became, upon the husband's death or upon divorce, independent of her father, irrespective of her age; it was so under the rules of the Mishnah (*Yebamoth*, XIII, 6), which speaks of an "orphan during the father's life."

(*e*) The most striking coincidence is in the form of the written contract. Not only the Mishnah, which embodies customs which the Jews might have learned during the Babylonian exile, but Jeremiah xxxii, a pre-exilic record (*salva venia* of the higher critics!), shows that the attesting witnesses were the most important factors of every written deed, bond, or agreement. The contract takes the form of a protocol; in Judaea, as well as in Babylon, the parties are introduced speaking (it is *igbi* in Babylon, *amar* in Judaea): thus in the *Kethubah* the groom makes his proposal, the bride accepts it, the scrivener declaring: "and this maiden consented," &c. At the head of each contract is the date, at the end the attestation of the witnesses.

But it is needless to go into further details, for any one even moderately acquainted with דיני ממונות cannot read Babylonian contract tablets without being constantly reminded, now of this, now of that custom or law recorded in the Mishnah.

The theory on which I account for the coincidences, and for the contrast between Babylonian and Jewish Law, has been repeatedly hinted at in the above pages; with permission of the editors I shall set it forth to the best of my ability in another number of the JEWISH QUARTERLY REVIEW.

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